

JUL - 7 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT DOCKET NO. 97-115

**PETITION OF SANTO J. PITTSMAN FOR CLARIFICATION OR,
IN THE ALTERNATIVE, RECONSIDERATION OF THE COMMISSION ORDER
OF JUNE 6, 1997 REGARDING A PROCESS FOR RESOLVING ISSUES
PERTAINING TO HIM INDIVIDUALLY**

I. INTRODUCTION

No. of Copies rec'd
List A B C D E

"Bureau") issue a list of all "former or current MobileMedia officers, directors and senior managers" (the "Listed Individuals"), and characterized all such persons as "potential wrongdoers." Pittsman currently is a Senior Vice President of MobileMedia. Furthermore, the Order stated that those persons, based solely on their status as Listed Individuals, may not, inter alia, have any role in the future operation and management of the Company. In addition, the Order directed that a radio application by any applicant in which a Listed Individual has an attributable interest would require resolution of whether such Listed Individual had engaged in any wrongdoing in this matter.

On June 25, 1997, the Bureau issued a "Revised and Corrected List of Former and Current Officers, Directors and Senior Managers of MobileMedia Corp. and Subsidiaries," which included Pittsman as a Listed Individual.

This Petition is directed solely to the issue of the process to be afforded by the Commission to ensure that a Listed Individual in Pittsman's situation has an opportunity to clear his name and to remove himself from the apparent prohibitions on his future employment set forth in paragraphs 17-18 of the Order. Pittsman fully supports the Commission's stay order and does not believe that the limited relief requested in this Petition requires any change in the Order other than to clarify or to set forth that a procedure is required within which an officer, director or senior manager of MobileMedia is assured of an opportunity to clear his name. Otherwise, unless clarified, the Order directly impairs Pittsman's future ability to earn a livelihood in the telecommunications industry. In light of the grave liberty interests resulting from being a Listed Individual and from being described by a Government agency as a "potential wrongdoer", we assume that the Commission

intended in its Order that there will be a process to resolve the issue of potential wrongdoing as to any such person and the limits of any potential consequences that may be appropriate as to specific individuals with respect to their future employment. Pittsman respectfully requests that the Commission clarify that there will be such a process whereby he is assured of having such an opportunity, and that he will have that opportunity in a timeframe which will avoid further and unnecessary injury to his future employment prospects.

II. PROCEDURAL BACKGROUND

In the Order, the Commission stated that Second Thursday treatment for MobileMedia must include a showing with respect to "all potential wrongdoers, that is all former and current officers, directors and senior managers," including whether any of them has engaged in wrongdoing which is the subject of these proceedings. The Commission appeared to state further that (1) following any bankruptcy reorganization of MobileMedia, Listed Individuals must have "no role in the future operation and management of the company," and (2) any radio applications of other entities in which a Listed Individual has an attributable interest will not be granted without resolving whether that person has engaged in wrongdoing.

Under the Order, "former and current officers, directors or senior managers" of MobileMedia are required to be listed without consideration of any additional inculpatory or exculpatory facts, without regard to whether there is any evidence on the issue whether in fact they are or are not wrongdoers, and without any determination in that respect having been made by the Commission. The Order is not limited to wrongdoers, to persons who have been formally determined by some quantum of evidence to be wrongdoers, or even to suspected wrongdoers.

The Order appears to contemplate a process in some circumstances for making a determination whether a Listed Individual is or is not a wrongdoer. Paragraph 18 specifies that the scope of the Hearing Designation Order, MobileMedia Corp., FCC 97-124 (Apr. 8, 1997) ("HDO"), "includes whether any former or current MobileMedia officers, directors and senior managers have engaged in wrongdoing." But, the Commission has specified in the stay order only two types of circumstances in which such issue may be resolved with respect to any particular Listed Individual: (1) the situation in which Second Thursday relief is ultimately not granted and the original hearing goes forward; and (2) the context of another specific radio application by another entity in which the Listed Individual has an attributable interest.

ARGUMENT

A. The Order Fails to Provide a Certain Opportunity for a Process for Pittsman to Clear His Name.

The difficulty with the Order as written is that it does not ensure that any individual in Pittsman's position ever will have an opportunity to clear his name. The process for resolution of the wrongdoing issue as to individuals is specified in Paragraph 18. But under that paragraph, while there would be a process to determine whether the officer, director or senior manager has engaged in wrongdoing in the event that Second Thursday relief is denied, there is no assurance that the person will get a chance to clear his name if, on the other hand, Second Thursday relief is ultimately granted.

In the absence of such a resolution for the individual officer, director or senior manager, the Order appears to state that no such individual can remain employed in any restructured company that emerges after Second Thursday treatment, if ultimately granted.

Thus, just as a result of the listing, without an assured opportunity to resolve the wrongdoing issue as to any such individual, the Order can be read effectively to mean that MobileMedia must terminate each of those individuals' employment prior to the stay being lifted ten months from now; otherwise, it is difficult to understand how MobileMedia could make a successful Second Thursday showing.

Nor can any officer, director or senior manager have any practical prospect of obtaining another job in the telecommunications industry. Unless the Commission provides the procedural opportunity to resolve the potential wrongdoing issue with respect to an individual such as Pittsman, it would be extremely difficult for that person to obtain significant employment with a company that has licenses with, or applications before, the Commission. Otherwise, the applicant would fear that its license or application would be at risk unless and until the individual can get his name cleared. What licensee or applicant would take the risk just to hire such a new employee? Further -- and without limitation to the telecommunications industry -- the stigma of being listed as a "potential wrongdoer" -- with the implication that the person already has been officially found to have engaged in wrongdoing -- is certain to cast a cloud over the Listed Individual's employability in any industry.

Thus, the Commission's designation of Pittsman as a "potential wrongdoer" subjects him to potential loss of his livelihood in his present job and loss of future employment prospects in the telecommunications industry -- all without a specific fact-based finding against him or an opportunity to defend himself and clear his name. Beyond being

fundamentally unfair, such loss is unquestionably an individual liberty or property interest which is constitutionally protected.

B. Constitutional Due Process Requires that Pittsman Have an Assured Opportunity to Clear His Name.

It is well-established that the actual or threatened loss of basic fundamental rights, such as the ability to practice a livelihood, raises serious and significant constitutional issues. There is settled authority that government agencies may not interfere with such freedoms -- cognizable and protected as "liberty and property interests" -- without complying with certain basic safeguards. At a minimum, those safeguards require in this case that the Commission provide Pittsman with an opportunity to be heard, and to clear his name.

In the absence of clarification providing for a practical and timely process, the Order may injure Pittsman as a matter of law by: (a) excluding him from employment opportunities at MobileMedia or any company with licenses or applications before the FCC; and (b) effectively preventing him from continuing his career in the telecommunications industry. Such "listing" would deprive Pittsman of his liberty and property rights which are recognized and protected by both the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act ("APA"). See Kartseva v. Department of State, 308 U.S. App. D.C. 397, 37 F.3d 1524, 1527 (1994); Reeve Aleutian Airways, Inc. v. United States, 299 U.S. App. D.C. 206, 982 F.2d 594, 598 (1993) (airline had "liberty interest" in avoiding damage to its reputation and business from government action). Simply put, Pittsman is entitled to the protections afforded by due process if the Government is to stigmatize and penalize him. See Old Dominion Dairy Products, Inc. v. Secretary of Defense, 203 U.S. App. D.C. 371, 631 F.2d 953 (1980).

As explained above, the Order, without clarification, may intrude on Pittsman's "right to follow a chosen trade or profession." See generally Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895-96 (1961). It is well-established that the Government can not interfere with such important liberty and property rights, see Greene v. McElroy, 360 U.S. 474 (1959) without satisfying the concerns of due process.

Although the protection afforded by due process varies with the circumstances, the Supreme Court recently reaffirmed the pertinent considerations. In considering the pertinent procedural protections, the Court stated that:

To determine what process is constitutionally due, we have generally balanced three distinct factors:

'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.'

Gilbert v. Homar, 65 U.S.L.W. 4442, 4444 (U.S. 1997) (citing authority).

Applying those factors here requires that the Commission provide a practical process in which Pittsman has an opportunity to defend himself: due process and fairness demand that Pittsman have a procedural safeguard to give him a chance to clear his name.

"Where a person's good name, reputation, honor, or integrity is of stake because of what the government is doing to him,' the minimal requirements of the clause must be satisfied." Goss v. Lopez, 419 U.S. 565, 574 (1975), quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Those minimal requirements are "notice and an opportunity to be heard. . . ." Constantineau, 400 U.S. at 437. See also Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972).

C. The Commission Should Clarify That A Process is Available for Pittsman to Clear His Name.

The Commission's Order tars Pittsman as a "potential wrongdoer" solely on the basis of his status as a former or current officer, director or senior manager of MobileMedia without any finding or determination of record that he is in fact a wrongdoer or even a suspected wrongdoer. To compound the unfairness of the present situation, Pittsman has not engaged in any wrongdoing. The Company has submitted his affidavit in which he denied knowledge of the issues relating to the false filings which have prompted these proceedings.

Given Pittsman's undeniable liberty interest which is at issue here, we assume that the Commission intended to provide a process whereby a Listed Individual like Pittsman will have a certain opportunity in all events, should he so desire, to clear his name of any wrongdoing. Accordingly, Pittsman asks that the Commission clarify its Order to specify that such process will be provided. To the extent necessary, this petition should be treated as a petition to reconsider the Order, pursuant to Rule 1.106 of the Commission's Rules, to provide for such a process.

As stated supra, the Order certainly appears to contemplate that there might be a process available for an officer, director or senior manager to resolve this issue as it pertains to him individually. In addition, the Commission has authority under Section 403 of the Federal Communications Act, 47 U.S. Code § 403, to institute an inquiry in a case like this, and there are surely other procedures available that would provide for a fair and impartial resolution of this issue without unduly burdening the Commission or affecting the stay.

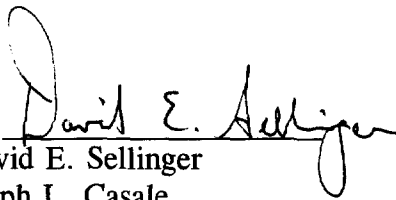
Pittsman stands ready to discuss with the Commission or the Staff the appropriate procedures to be employed in such a process.

III. CONCLUSION

The Commission should clarify its Order to state that Pittsman will be afforded a timely process in all events within which he will have a timely opportunity to resolve the issue whether he personally was engaged in wrongdoing which is the subject of these proceedings, and what, if any, consequences might be appropriate for him individually with respect to his future employment. Alternatively, if the Commission does not believe that any clarification is needed, it should reconsider and issue a revised Order specifying that such a process will be provided.

Respectfully submitted,

SANTO J. PITTSMAN

By: 
David E. Sellinger
Ralph L. Casale

His Attorneys
TUCKER, FLYER & LEWIS
1615 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 452-8600

Date: July 7, 1997

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 1997, I caused copies of the foregoing Petition of Santo J. Pittsman for Clarification or, in the Alternative, Reconsideration of the Commission Order of June 6, 1997 Regarding a Process for Resolving Issues Pertaining to Him Individually, to be served by hand or by first-class U.S. Mail, postage prepaid, to the following:

The Honorable Reed E. Hundt*
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

The Honorable Rachelle B. Chong*
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

The Honorable Susan Ness*
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

The Honorable James H. Quello*
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

The Honorable Joseph Chachkin*
Federal Communications Commission
2000 L Street, N.W.
Second Floor
Washington, D.C. 20554

William E. Kennard, Esquire*
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

Raymond G. Bender, Jr.
Michael D. Hays
Thomas J. Hutton
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036-6802
(Attorneys for David A. Bayer)

Steven A. Lerman
Dennis P. Corbett
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809
(Attorneys for Hellman & Freidman
Capital Partners II, L.P.)

Phillip L. Spector
Patrick S. Campbell
Paul, Weiss, Rifkind,
Wharton & Garrison
1615 L Street, N.W.
Suite 1300
Washington, D.C. 20036
(Attorneys for the Unsecured Creditors)

David S. Kurtz
Jones, Day, Reavis & Pogue
77 West Wacker
Chicago, IL 60601-1692
(Attorneys for the Unsecured Creditors)

Louis Gurman
Kimberly D. Wheeler
Gurman, Blask & Freedman, Chartered
1400 16th Street, N.W.
Suite 500
Washington, D.C. 20036
(Attorneys for Western Wireless
Corporation)

Daniel B. Phythyon*
Acting Chief
Wireless Telecommunications Bureau
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

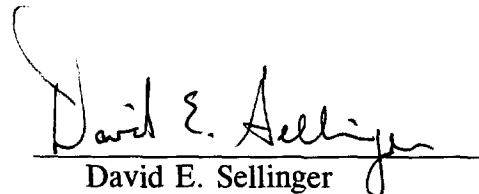
Rosalind K. Allen*
Deputy Chief
Wireless Telecommunications Bureau
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Gary P. Schonman*
D. Anthony Mastando
Enforcement Division
Wireless Telecommunications Bureau
2025 M Street, N.W.
Room 8308
Washington, D.C. 20554

Richard E. Wiley
Robert L. Petit
Richard Gordin
Nathaniel F. Emmons
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20036
(Attorneys for MobileMedia Corporation)

Alan Y. Naftalin
Arthur B. Goodkind
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(Attorneys for MobileMedia Corporation)

John Harwood
William Richardson
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(Attorneys for MobileMedia Corporation)


David E. Sellinger